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Deconstructing unlawful act manslaughter

Gavin Leigh*

Abstract The aim of this article is to separate out and justify two means of proving manslaughter by an unlawful (and dangerous) act. One is manslaughter by an act of intended bodily harm. The other is manslaughter by an unlawful and dangerous act. Some historical authority for these two kinds of unlawful act manslaughter is established, but the line of argument centres on the separate justifications for each kind. The justification for manslaughter by an act of intended bodily harm centres on the relationship between intention and luck. The justification for manslaughter by an unlawful and dangerous act concentrates on the distinction between negligence and heedlessness. This article concludes that manslaughter by an act of intended bodily harm may be justifiable, but that this may be possible where death is caused through any advertent crime. This is with a view to potential development or reform through the courts or Law Commission.

Keywords Unlawful act manslaughter; moral luck; intention; negligence; heedlessness

Last year marked the fiftieth anniversary of Richard Buxton's 'classic article'¹ on unlawful act manslaughter and the tenth anniversary of the Law Commission's most recent proposals for its reform. Buxton's view, that unlawful act manslaughter is justified by an act of intended bodily harm, can be contrasted with the slightly wider

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¹ A. Ashworth, 'Case Comment' [2013] Crim LR, 4, 335 at 336. Cf. R. Buxton, 'By Any Unlawful Act' (1966) 82 LQR 174.

approach of the Law Commission, for whom intention or recklessness was sufficient. Nevertheless, Glanville Williams had suggested, before Buxton laid down his line of attack, that ‘every charge of involuntary manslaughter ... [should instead necessitate] proof of criminal negligence ... as to the death’.² Criticism of unlawful act manslaughter can be found in the Victorian Criminal Law Commissioners’ Fourth Report,³ and as recently as four years ago Andrew Ashworth noted that the ‘conflict of principle’ had still to be resolved.⁴ The Court of Appeal’s current position is that manslaughter can be established by a reasonably foreseeable risk of some bodily harm in the circumstances known to the defendant,⁵ through the commission of an advertent criminal act,⁶ which (legally) caused death. For the appellate court, legislative intervention was the recommended way forward.⁷ In this article, I hope to establish moral and historical authority for two separate kinds of unlawful act manslaughter. I will argue that the current, amalgamated, crime is illogical: liability may be established on the basis of a death that is neither intended nor foreseen, nor even *capable* of being foreseen by the individual concerned. With a view to separating out the possible justifications for two kinds of unlawful act manslaughter, I will establish some historical authority for both means of proof, before considering the possible justifications for each. The conclusion will suggest that manslaughter by

² G. Williams, ‘Constructive Manslaughter’ [1957] Crim LR 293 at 301.

³ H. M. Commissioners on Criminal Law, Fourth Report of Her Majesty’s Commissioners for Revising and Consolidating the Criminal Law (1839) xxviii: ‘It may be very questionable whether, in point of principle, an effect *wholly* unexpected and unconnected with the intention and act of the party, except by accident, can properly be made the foundation of criminal responsibility; for as the object of punishment is the prevention of crime, it ought properly to be annexed to such acts as are in themselves culpable by reason of their mischievous tendency, and the intention with which they are done, and not to such as are simply accidental and unintentional.’ Italics added.

⁴ Above n. 1 at 337.

⁵ R. v JF and another [2015] EWCA Crim 351, [2015] All ER (D) 117 (Mar). Cf. D. P. P. v Newbury and Jones [1977] AC 500 (HL).

⁶ The Court of Appeal indicated that the mental element for the crime was sufficient, not necessary, suggesting that the unlawful conduct need only be committed voluntarily and that, as a possible result, no crime is established without the death which is consequently caused. Cf. R. v Andrews [2002] EWCA Crim 3021, [2002] All ER (D) 321.

⁷ R. v JF and another [2015] EWCA Crim 351, [2015] All ER (D) 117 (Mar) at [33] (Lord Thomas, CJ).

an act of intended bodily harm may be justifiable, but that this may be possible where death is caused through any advertent crime.

More thoughts about the integrity of unlawful act manslaughter

The Law Commission's recommendation was that "criminal act manslaughter" should be defined as 'killing another person (a) through the commission of a criminal act intended by the defendant to cause injury, or (b) through the commission of a criminal act that the defendant was aware involved a serious risk of causing some injury'.⁸ The Law Commission's definition was, therefore, wider than that of manslaughter by an act of intended bodily harm. By a *serious* degree of risk,⁹ the Law Commission did not mean to qualify the degree of risk generally required for recklessness.¹⁰ For the last two decades the debate has been characterised by arguments surrounding so-called "one punch" manslaughter: one punch might, for example, cause the victim to fall awkwardly, hit his or her head and accidentally die as a result. Barry Mitchell and Jeremy Horder have respectively argued either that a foreseeable risk of death is required, in the context of committing an advertent criminal act,¹¹ or that, from the standpoint of 'moral luck',¹² causing death is indivisible from the violation of respect for physical integrity involved in an act of intended bodily harm.¹³

⁸ Law Commission, *Murder, Manslaughter and Infanticide*, Cm 304 (2006) para.1.38.

⁹ *Ibid.* at para 3.40: 'more than insignificant or remote'.

¹⁰ *R. v Brady* [2006] EWCA Crim 2413, [2006] All ER (D) 239 (Oct) at [15] (Hallett LJ): 'it is, in our view, simply unarguable that, as a matter of law, since *G* a trial judge is bound to qualify the word "risk" by the words "obvious and significant" and, without such qualification, any directions on recklessness are fundamentally flawed.'

¹¹ B. Mitchell, 'More Thoughts about Unlawful and Dangerous Act Manslaughter and the One-punch Killer' [2009] Crim LR 502.

¹² T. Nagel, *Moral Luck* (Cambridge University Press: Cambridge, 1979) 26: 'Where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment, it can be called moral luck.'

¹³ J. Horder, 'Violating Physical Integrity: Manslaughter by Intentional Attack', in J. Horder (ed.), *Homicide and the Politics of Law Reform* (Oxford University Press: Oxford, 2012) 140.

Unlawful (and dangerous) act manslaughter

It is important to recognise that the two kinds of unlawful act manslaughter—causing death by an act of intended bodily harm and causing death by an unlawful and dangerous act—both clarify and obscure one another. Foster’s definition—‘if one give [sic] another a box on the ear, or strike with a stick, or other weapon not likely to kill, and unluckily and against his intention kills, it is manslaughter’¹⁴—was clarified by the requirement, in *Larkin*,¹⁵ that the degree of bodily harm should be injury. *Larkin*¹⁶ relied on *Archbold*,¹⁷ to the extent that manslaughter by an act of intended bodily harm was amalgamated with unlawful *and dangerous* act manslaughter.¹⁸ *Archbold* was not clear about the distinction between manslaughter by an act of intended bodily harm and unlawful *and dangerous* act manslaughter,¹⁹ although it did recognise unlawful *and dangerous* act manslaughter,²⁰ which was indicated to have involved a probable risk of bodily harm since *Fenton*.²¹ Part of the courts’, or reform bodies’, aversion to raising the required degree of foreseeable harm to that actually caused, has been a concern to deter, however inefficiently,²² crimes of violence.²³

¹⁴ H. M. Commissioners on Criminal Law, Second Report of Her Majesty’s Commissioners for Revising and Consolidating the Criminal Law (1846) 56 (Thomas Starkie): ‘Foster, Disc. II., ch. 5, ss. 1-2; and ch. 1, ss. 1-2’. Cf. J. F. Stephen, A History of the Criminal Law of England, Vol. III (Macmillan: London, 1883) 56: ‘If he intentionally strikes him a blow with his fist or with a small stick with no intention to inflict any great harm, and happens to kill him, he is guilty of manslaughter.’

¹⁵ R. v Larkin [1943] KB 174, [1943] 1 All ER 217 (CCA).

¹⁶ Ibid.

¹⁷ J. F. Archbold, A Summary of the Law relative to Pleading and Evidence in Criminal Cases, R. E. Ross and M. Turner (eds), 30th edn (Sweet & Maxwell: London, 1938).

¹⁸ Above n. 15 at 219.

¹⁹ Above n. 17 at 900: ‘All struggles *in anger*, whether by fighting, wrestling, or in any other mode, are unlawful and [that] death occasioned by them is manslaughter at the least. R. v. Canniff 9 C. & P. 359.’

²⁰ Above n. 17 at 902: ‘Where a dangerous and unlawful act is done, even in sport, if death results it is manslaughter: e.g....*Fenton*’.

²¹ *Fenton’s and Others’ Case* (1830) 1 Lewin 179, 168 ER 1004.

²² See Buxton, above n. 1 at 174.

²³ Attorney General’s Reference (No 60 of 2009) (R. v Appleby) [2009] EWCA Crim 2693, [2009] All ER (D) 182 (Dec).

their views have arguably been obscured by the amalgamated definition, which includes both crimes of violence and non-violent crimes.

The implication of Horder's "pure" manslaughter, by an act of intended bodily harm, is that there is 'no independent work to do ... for the dangerousness element'.²⁴ Moreover, as Smith notes, in the nineteenth century most cases were 'in the nature of an assault and therefore intrinsically carry the risk of some harm.'²⁵ Support for this view can be found in *Plummer*,²⁶ where Gurney, B., remarked that:

this manslaughter wears a very different aspect from those which ordinarily come under our notice. In the great majority of cases, the manslaughter, indeed, I may say in almost all such cases, the death, is the result of some violent act done or committed.²⁷

This explains why Buxton noted that it was not 'positively laid down in any of the nineteenth-century cases that the act must have been not only unlawful but also "dangerous"'.²⁸ An act of intended bodily harm had been recognised in Russell's text for practitioners:

any one [sic] who voluntarily, knowingly, and unlawfully, intends hurt to the person of another, though he intend not death, yet, if death ensue, is guilty of murder or manslaughter, according to the circumstances of the nature of the

²⁴ Above n. 13 at 152.

²⁵ K. J. M. Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800-1957* (Clarendon: Oxford, 1998) 196.

²⁶ *R. v George Plummer* (1844) 1 Car & K 600, 174 ER 954.

²⁷ *Ibid.* at 604–605.

²⁸ Above n. 1 at 183.

instrument used, and the manner of using it, as calculated to produce great bodily harm or not.²⁹

There was, however, a second kind of unlawful act manslaughter, which was historically recognised. This was apparent from Foster, and in the practitioners' texts of East and Russell, all of whom recognised an element of dangerousness in their definitions of unlawful *and dangerous* act manslaughter. The Victorian Criminal Law Commissioners acknowledged this element of Foster's definition, not only in relation to immoral, but also unlawful, acts as its constructive basis.³⁰ Russell,³¹ relying on East,³² suggested a requirement that 'the act might probably breed danger'.³³

It seems likely, then, that there were and potentially could be two kinds of unlawful act manslaughter, which might conceivably have separate moral or legal justifications. One was causing death by an act of intended bodily harm. The other was arguably causing death by an unlawful *and dangerous* act.

Manslaughter by an act of intended bodily harm

Horder initially suggested that there were grounds for homicide liability with regards to the unintended and unforeseen consequences of an attack.³⁴ This was through a change of normative position: it can be described as a shift in terms of the criminal liability that ought to be imposed for the consequences of a defendant's action,

²⁹ W. M. O. Russell, *A Treatise on Crimes and Misdemeanors*, Vol. I (Joseph Butterworth and Son and J. Cooke: London, 1819) 756.

³⁰ Above n. 3 at xxix: 'It is observable that in the above case the learned Judge does not appear to have relied entirely on the ground that the act from which death resulted was *malum in se*, he further observes that the practice is "dangerous to by-standers."' Cf. above n. 3 at xlii: '1 East's P.C., 259. 1 Hale's P.C., 39, 475. This rule makes the killing manslaughter where the act ... is unlawful *and* is attended with risk to the person'. Italics added.

³¹ Above n. 29.

³² E. H. East, *A Treatise of the Pleas of the Crown*, Vol. I (J. Butterworth and J. Cooke: London, 1803) 257.

³³ Above n. 29.

³⁴ J. Horder, 'A Critique of the Correspondence Principle in Criminal Law' [1995] Crim LR 759 at 764.

where that action was an *intended* criminal act of violence; if the violent act is committed *recklessly*, liability should not extend beyond the degree of personal harm foreseen and risked. For this, Horder relied on his malice and proportionality principles.³⁵ The malice principle was said to permit liability for the unforeseen consequences of an intended attack on another's person, or property, provided that those consequences were of the same kind, if not of the same degree. The proportionality principle indicated, however, that the degree of unforeseen harm caused should be proportional to that intended. Although Ashworth criticised Horder's proportionality principle as 'vague', it was suggested that this proportionality might equate to one step up in a ladder of offences against the person, so that, for example, an intended act of grievous bodily harm was sufficient justification for liability with regards to consequently causing death.³⁶ This meant that the label murder, but not manslaughter,³⁷ could be justified in these terms.

The change of normative position implied by intentionally attacking another was approached quite differently by John Gardner. For him, the advertent commission of a crime provides notice of impending liability for its unforeseen consequences. This means that the defendant has an opportunity to avoid liability for homicide by avoiding the commission of a crime, the dangerous circumstances of which cause death. Gardner was clear that an advertent crime, which includes recklessness or intention in its definition, is a more efficient means of putting the defendant on notice of liability for unforeseen consequences which flow from the commission of that crime.³⁸ Morally speaking, the 'killing' was put forward as the

³⁵ J. Horder, 'Two Histories and Four Hidden Principles of Mens Rea' (1997) 113 LQR 95.

³⁶ A. Ashworth, 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) 11 *New Criminal Law Review* 232 at 252.

³⁷ The appropriateness of the label "manslaughter" is outside the scope of this article.

³⁸ H. L. A. Hart, 'Introduction by John Gardner' in J. Gardner (ed.), *Punishment and Responsibility, Essays in the Philosophy of Law*, 2nd edn (Oxford University Press: Oxford, 2008) xlv: 'A fact that she

‘basic wrong’, but the rule of law was said to change the defendant’s normative position through the unlawful act.³⁹ As Ashworth noted, however, ‘fair warning of an unfair rule does not turn it into a fair rule.’⁴⁰ For him, the defendant should be able to choose whether to risk liability for homicide, and this choice should be based on a foreseen, or at least a foreseeable, risk of death; this is an element of the correspondence principle.⁴¹ Gardner explained that changing one’s normative position was not meant as a justification of the law, only as a means of understanding it.⁴²

One of Ashworth’s suggested means of justifying liability in these circumstances was the harm which is objectively risked.⁴³ Mitchell argued that although the degree of risk could not readily be calculated in all circumstances, the risk of death from a punch might be said to be ‘strictly’ foreseeable.⁴⁴ This was, however, an alternative justification from the change of normative position. It does not tell us why a defendant should be held liable for homicide on the basis of an *intended* act of violent crime; instead it suggests that an objective risk of death is enough. This is a possible justification for manslaughter by an unlawful and dangerous act, but not manslaughter by an act of intended bodily harm.

Ashworth determined that the real justification for the change of normative position was, therefore, the *intention* to attack another’s person, and that the proportionality principle merely acted as a limitation on the extent of liability for the

could have become aware of by paying more attention is a possible substitute, but it is by no means a perfect substitute. It leaves more to chance in the warning that the law gives to the defendant of her impending violation.’

³⁹ J. Gardner, *Offences and Defences: Selected Essays in the Philosophy of Law* (Oxford University Press: Oxford, 2007) 248.

⁴⁰ Above n. 36 at 247.

⁴¹ *Ibid.* 236.

⁴² Above n. 39 at 247.

⁴³ Above n. 36 at 252.

⁴⁴ Above n. 11 at 503.

unforeseen consequences of an attack.⁴⁵ For this, Horder had relied on the idea that an intended, rather than a foreseen, consequence, means that ‘I “make my own” luck’ with regards to its unforeseen consequences.⁴⁶ This was partly reliant on ‘Hegel’s basic claim, that one is responsible for the consequences integral to one’s actions’.⁴⁷ Hegel believed that actions are affected by the luck inherent in a world of chance *and* that those actions still belong to us, irrespective of their unforeseen or unintended consequences.

In response to Ashworth’s criticisms of the proportionality principle and, additionally, of the susceptibility of the ‘family of violence’ to extension on policy grounds,⁴⁸ Horder suggested that an intended act of *actual bodily harm* was ‘indivisible’ from the law’s respect for life; a moral value encompassed in ‘physical integrity’, which unlike damage to property cannot be consented to by the individual involved.⁴⁹ The argument was, therefore, shifted onto new ground, which was said to have nothing at all to do with whether death is a foreseeable result.⁵⁰

But what is it that imbues intention with such justificatory force? Part of one answer to this lies in Horder’s reference to Antony Duff’s explanation of an intentional attack as the ‘active hostility’ displayed in that action,⁵¹ as compared to his association of risk-creation with ‘endangerment’,⁵² but it also lies in a reassessment of how intention relates to luck.

There are, it has been said, both cognitive and affective states of mind. A cognitive state of mind involves, for example, foresight of an outcome as possible,

⁴⁵ Above n. 36 at 255.

⁴⁶ Above n. 34.

⁴⁷ J. Horder, ‘Questioning the Correspondence Principle—A Reply’ [1999] Crim LR 206 at 211.

⁴⁸ Above n. 36 at 244.

⁴⁹ Above n. 13.

⁵⁰ See Horder, above n. 13 at 143.

⁵¹ R. A. Duff, *Answering for Crime* (Hart Publishing: Oxford, 2007) 151.

⁵² R. A. Duff, ‘Whose Luck Is It Anyway?’ in C. M. V. Clarkson and S. Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Ashgate Publishing: Aldershot, 2008) 64.

probable, or virtually certain. An affective state of mind is an attitude towards that outcome. This can consist in an attitude of pursuit, as is the case with an intended outcome,⁵³ or the means by which that outcome is pursued. But it can also include risk-taking where an action's risked outcome was not foreseen, but could have been; an attitude that has been described as 'practical indifference'.⁵⁴ This attitude is a subjective state of mind, even if the risk is not adverted to.⁵⁵ So whilst subjective risk-taking involves an affective and/or a cognitive state of mind intended harm displays an affective *and* a cognitive state of mind.

Horder suggested that recklessness, by contrast with intention, involves only 'pure luck'.⁵⁶ His argument was that, where intention is concerned, the individual is 'striving' to accomplish the outcome—the attitude of pursuit.⁵⁷ This, it was said, was superimposed on Hegel's basic claim above. Hegel, however, indicated that '[i]n acting I must expose myself to misfortune; that also has a right to me, and is the manifestation of my own will.'⁵⁸ There is, therefore, an argument that our actions do not always lead to the consequences we foresee or intend *and* that we know or ought to know this.⁵⁹

Part of the reason that Duff distinguished between attack and endangerment, was that the action involved in an attack is 'structured' by the need to cause harm:⁶⁰

⁵³ A. Kenny, *Freewill and Responsibility* (Routledge and Kegan Paul Ltd: London, Henley and Boston, 1978) 46.

⁵⁴ R. A. Duff, Caldwell and Lawrence: *The Retreat from Subjectivism* (1983) 3(1) OJLS 77 at 90.

⁵⁵ J. Horder, 'Gross Negligence and Criminal Culpability' (1997) 47(4) U Tor LJ 495, 501.

⁵⁶ Above n. 34.

⁵⁷ Above n. 47 at 212.

⁵⁸ G. Hegel, *Hegel's Philosophy of Right*, S. W. Dyde tr. (George Bell & Sons: London, 1896) 115–116.

⁵⁹ Cf. A. Ashworth, 'Belief, Intent and Criminal Liability' in J. Eekelaar and J. Bell (eds), *Oxford Essays in Jurisprudence, Third Series* (Clarendon: Oxford, 1987) 20: 'an element of capacity to choose and of control is assumed not only in moral discourse but also in a large proportion of dealings between people.'

⁶⁰ Above n. 52.

its non-occurrence is seen, by the offender, as a failure or 'a source of regret'.⁶¹ This is the disposition displayed by the action. Intention, it might be argued, is structured by its relationship with and attitude towards luck in a way that recklessness is not. If I punch someone squarely in the face my action suggests that I intend to cause bodily harm.⁶² This outcome is not only affected by luck, it is *dependent* on it. I will have failed if the victim suddenly moves, or if I lose my balance; my attitude towards luck is manifestly different from that displayed by taking a wild swing with my fist, with an apparent awareness that I might connect with the victim's face and cause bodily harm. Whatever actually happens, the foreseen risk has been run and does not depend on luck. If the victim unluckily and against my intention falls and suffers a fatal head injury, I show, specifically through an *intended* action, that my relationship with and attitude towards luck is qualitatively different from that shown by foresight or foreseeability.

Clearly, some violent crimes are committed by an intoxicated offender. Manslaughter by an act of intended bodily harm would require a "specific" intent, which means that the offender's intent would have to be proven, even if intoxicated, for a manslaughter conviction to follow.⁶³ We will see how the doctrine of prior fault affects manslaughter by an unlawful *and dangerous* act.⁶⁴

Perhaps, in this context, unlawful act manslaughter is morally justified. But does it efficiently deter? To avoid liability for causing death, without avoiding all violent crime, means having at least the capacity to foresee death as an eventuality. This is where a 'limiting principle' may be required.⁶⁵ If the degree of harm intended

⁶¹ Ibid. at 67.

⁶² Ibid. at 75: 'the courts ... must work only with what was displayed in and by the defendant's criminal actions'.

⁶³ D. P. P. v Majewski [1977] AC 443 (HL). Cf. R. v Heard [2007] EWCA Crim 125, [2008] QB 43.

⁶⁴ See Ashworth, below n. 120.

⁶⁵ See Ashworth, above n. 36.

is actual bodily harm, from a single blow, or a sufficient combination of blows, or a push apparently designed to cause actual bodily harm, there is an argument that death is a *logically* foreseeable result, whatever the circumstances, inasmuch as bodily harm is a part of killing.

Manslaughter by an unlawful and dangerous act

If an offender causes death in the commission of an unlawful act, which does not involve an act of intended bodily harm, there is no justification for the attribution of liability for manslaughter unless death was foreseen or foreseeable. The degree of foreseeable harm, through the circumstances of the unlawful *and dangerous* act, becomes critical to this kind of unlawful act manslaughter's moral and legal justification. Further requirements, which will be explained, include the capacity to foresee the risk in terms of age and mental capacity, a likely degree of risk and the opportunity to avoid causing it.

Victor Tadros suggested that if the crime 'creates a risk of death, even a small risk, there is good reason to see the imposition of that risk as wrongful'.⁶⁶ While Mitchell saw the unlawful context as less important than the degree of risk involved, his view ultimately relies on 'a recognisable (albeit unlikely) risk of death'.⁶⁷ Buxton had criticised the current law, as established in *Church*,⁶⁸ on the grounds that the 'irrelevant unlawfulness of the defendant's conduct is used to justify the imposition of liability for even a slight degree of negligence'.⁶⁹

Without the justificatory force of an act of intended bodily harm, there are no grounds for extending liability beyond those consequences foreseen or foreseeable;

⁶⁶ V. Tadros, 'The Limits of Manslaughter' in C. M. V. Clarkson and S. Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Ashgate Publishing: Aldershot, 2008) 48.

⁶⁷ Above n. 11 at 511.

⁶⁸ *R. v Church* [1966] 1 QB 59 (CCA).

⁶⁹ Above n. 1 at 192.

the degree of harm that is or should be contemplated ought to be the death caused. This is supported, in part, by the correspondence principle, which involves the degree of harm caused equating to that intended or risked and Tadros has noted that this may apply to both advertent and inadvertent risk-taking.⁷⁰

It might be argued that the objective nature of dangerousness—that the risk is foreseeable to a bystander from the circumstances of the crime⁷¹—is a reasonable one, provided that it recognises the capacity of the defendant to foresee what the bystander would have foreseen. The law, however, has resolutely refused to follow the path laid down for it almost fifty years ago by HLA Hart, for whom:

those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities.⁷²

Punishment for this kind of risk-taking can act as a deterrent even if the sanction cannot act as a guide at the moment of deliberation, but instead ‘causes him to exert his faculties’ in ‘the knowledge that others are punished’.⁷³ The opportunity to take account of the defendants’ age and mental competency, in the objective test of dangerousness, was declined in *JF and NE*.⁷⁴ The Court of Appeal’s position is

⁷⁰ V. Tadros, *Criminal Responsibility* (Oxford University Press: Oxford, 2005) 95.

⁷¹ *R. v Dawson* (1985) 81 Cr App R 150 (CA).

⁷² H. L. A Hart, *Punishment and Responsibility, Essays in the Philosophy of Law*, 2nd edn, J. Gardner (ed.), (Oxford University Press: Oxford, 2008) 152.

⁷³ *Ibid.* at 134. Cf. J. Bentham, *An Introduction to the Principles of Morals and Legislation*, Vol. II, first published 1789, a new edition corrected by the author (E. Wilson and W. Pickering: London, 1823) ch. XIII, para. X: ‘although he may know that he is about to engage in the *act* itself ... he knows not of the *tendency* it has to produce that mischief’.

⁷⁴ *R. v JF and another* [2015] EWCA Crim 351, [2015] All ER (D) 117 (Mar).

difficult in the light of various recommendations for reform, but the test can hold a defendant liable for failing to reach a standard that s/he is incapable of attaining.

The degree of risk required in *Larkin*⁷⁵ was one of likelihood and, where inadvertent risk-taking is concerned, part of the justification for criminal liability, at least with regards to negligence, is that the degree of risk is sufficient to suggest to the defendant the obvious risk of which s/he should have been aware. In this respect, the justifications differ in terms of the kind of foreseeability involved: manslaughter by an act of intended bodily harm relies on death as a *logically* foreseeable result, irrespective of the circumstances; manslaughter by an unlawful *and dangerous* act depends on death as a *likely* and, therefore, foreseeable outcome in all the circumstances. Unlawful act manslaughter *appears* to require, because this was obiter, a risk.⁷⁶ *Newbury*⁷⁷ indicated that ‘*Church* ... [was] not intend[ed] to differ from or qualify anything which had been said in ... *Larkin*’,⁷⁸ but subsequent decisions have referred to a likelihood,⁷⁹ a risk,⁸⁰ or the risk.⁸¹ The Victorian Criminal Law Commissioners did not quantify the degree of risk involved,⁸² but *Fenton* was reported as a ‘prove[n] ... probable consequence [of] death or injury’.⁸³ The view that probable risk should be necessary was supported by jurists including Holmes on the basis of an opportunity to avoid causing harm,⁸⁴ and by Edwin Clark (and the Victorian Commissioners⁸⁵) on the understanding that it was

⁷⁵ Above n. 15.

⁷⁶ *R. v Carey* [2006] EWCA Crim 17, [2006] All ER (D) 189 (Jan) at [31] (Dyson LJ).

⁷⁷ *DPP v Newbury and Jones* [1977] AC 500 (HL).

⁷⁸ *Ibid.* at 507.

⁷⁹ *R. v Dawson* (1985) 81 Crim App R 150 (CA). Cf. Attorney General’s Reference (No 3 of 1994) [1998] AC 245 (HL).

⁸⁰ *R. v Carey* [2006] EWCA Crim 17, [2006] All ER (D) 189 (Jan). Cf. *R. v Bristow (Terrence) & Ors* [2013] EWCA Crim 1540, [2013] All ER (D) 109 (Sep).

⁸¹ *R. v JF and another* [2015] EWCA Crim 351, [2015] All ER (D) 117 (Mar).

⁸² Above n. 3 at xlii: ‘attended with some risk to the person.’

⁸³ *Fenton’s and Others’ Case* (1830) 1 Lewin 179, 179; 168 ER 1004.

⁸⁴ O. W. Holmes, *The Common Law* (Macmillan: London, 1882) 56.

⁸⁵ Above n. 14 at 17.

necessary to suggest to the offender the risk of which s/he should have been aware.⁸⁶ Kenny subsequently interpreted *Franklin*⁸⁷ as involving 'such torts as are likely to cause bodily hurt.'⁸⁸ The court in *Larkin* relied on *Archbold*,⁸⁹ which illustrated the idea that the requirement of dangerousness involved an act that was 'likely to injure',⁹⁰ and appeared to from *Fenton*⁹¹ onwards.⁹² This likelihood should be a matter of common experience, which is within jurors' collective capabilities.

Unlawful *and dangerous* act manslaughter seemed to depend on avoiding the circumstances in which the crime was committed: the Victorian Commissioners referred to circumstances in which 'the act from which death results is unlawful *and* is attended with risk to the person';⁹³ John Austin to 'an act from which he was bound to forbear, *because* he adverts not to certain of its probable consequences';⁹⁴ Foster to 'an action, unlawful in itself, ... *done heedlessly and incautiously*'.⁹⁵

Heedlessness suggests that unlawful act manslaughter was reliant on a different form of probable risk, irrespective of any potential requirement of dangerousness before *Larkin*.⁹⁶ In *Long*,⁹⁷ counsel for the prosecution made reference to Foster: "if an action, unlawful in itself, be done deliberately ... *and* the act was done heedlessly and incautiously, it will be manslaughter".⁹⁸ The authority

⁸⁶ E. C. Clark, *An Analysis of Criminal Liability* (Cambridge University Press: Cambridge, 1880) 46.

⁸⁷ *R. v Franklin* (1883) 15 Cox CC 163.

⁸⁸ C. S. Kenny, *Outlines of Criminal Law* (Cambridge University Press: Cambridge, 1902) 120. Cf. *ibid.* at 115: 'Where some trivial blow is struck, with the intention of producing mere momentary pain, but death unexpectedly results from it, then, if it is an unlawful blow, the striker will be guilty of manslaughter.'

⁸⁹ Above n. 17.

⁹⁰ *R. v Larkin* [1943] KB 174, [1943] 1 All ER 217 (CCA) 219 (Humphreys J).

⁹¹ *Fenton's and Others' Case* (1830) 1 Lewin 179, 168 ER 1004.

⁹² Above n. 82.

⁹³ Above n. 3 at xlii. Italics added.

⁹⁴ J. Austin, *Lectures on Jurisprudence, Being the Sequel to "The Province of Jurisprudence Determined."* To which are added Notes and Fragments, Vol. II (Sarah Austin ed., John Murray: London, 1863) 103. Italics added.

⁹⁵ *R. v John St John Long* (1830) 4 Car & P 398, 399; 172 ER 756. Italics added.

⁹⁶ Above n. 15.

⁹⁷ *R. v John St John Long* (1830) 4 Car & P 398, 172 ER 756.

⁹⁸ *Ibid.* at 399. Italics added.

for heedlessness was further appended to the report in *Joseph Martin*.⁹⁹ It appeared, therefore, that unlawful act manslaughter should not simply have been established by causing death through the voluntary commission of an unlawful act, but that the act ought to have been heedless, or at least dangerous. This was in stark contrast to Hale's earlier view of the law.¹⁰⁰ Austin, whose lectures were known of in the 1830s,¹⁰¹ but whose influence on jurisprudence was not fully felt until his work was posthumously published,¹⁰² described the difference between negligence and heedlessness in these terms:

The states of mind which are styled "Negligence" and "Heedlessness," are precisely alike. In either case, the party is inadvertent. In the first case, he does *not* an act which he was bound to do, because he adverts not to it. In the second case, he *does* an act from which he was bound to forbear, because he adverts not to certain of its probable consequences. Absence of a thought which one's duty would naturally suggest, is the main ingredient in each of the complex notions which are styled "negligence" and "heedlessness."¹⁰³

Clark also distinguished between negligence and heedlessness, arguing that negligence 'in its proper sense, is confined to non-act.'¹⁰⁴ Unlike negligence, heedlessness relates only to probable risk and not to the conduct involved. There is no standard of conduct from which to depart, because the unlawful and dangerous

⁹⁹ *R. v Joseph Martin* (1827) 3 Car & P 211, 172 ER 390.

¹⁰⁰ M. Hale, *The History of the Pleas of the Crown*, Vol. I, first published 1680, S. Emlyn, G. Wilson and T. Dogherty (eds) (E. Rider, Little-Britain: London, 1800) 474: 'if A. without the licence of B. hunt in the park of B. and his arrow glancing from a tree killeth a by-ftander [sic], to whom he intended no hurt, this is manflaughter [sic], becaufe [sic] the act was unlawful'.

¹⁰¹ See Smith, above n. 25 at 122.

¹⁰² See Clark, above n. 86 at v.

¹⁰³ Above n. 94.

¹⁰⁴ Above n. 86 at 101.

act should not have been committed at all.¹⁰⁵ Negligence can involve the failure to take a different opportunity in relation to the foreseeable risk. “Gross” negligence comprises a failure to take straightforward precautions, which would have been taken by the reasonable person. In this way, gross negligence manslaughter may be the result of failing to minimise a foreseeable risk that has already been created.¹⁰⁶ Contrast this with heedlessness, which involves the creation of a foreseeable risk. By comparison with dangerousness, heedlessness meant that the unlawful act should not have been committed at all, because the act could be dangerous in the circumstances. The opportunity to avoid the creation of risk existed before the unlawful *and dangerous* act was committed and not as a result of dangerous circumstances arising during the unlawful act’s commission. Its justification came from dangerous circumstances and not simply from the commission of the unlawful act. Russell noted that the heedless act causing death was unlawful (and manslaughter) because it ‘was likely to breed danger’ in the circumstances.¹⁰⁷ Foster, on the other hand, seemed to believe that there should be an unlawful act *and* heedlessness. These views, taken together, focus attention on the dangerous circumstances of the unlawful act and, therefore, the opportunity to avoid them. Dangerousness is also an objective test but, by way of contrast, can involve the foreseeable risk arising during the commission of the crime, rather than before. It has been widened to include all of the circumstances surrounding the crime,¹⁰⁸ but does not always allow the defendant to avoid creating the risk.¹⁰⁹ This means that it is not always possible to avoid creating the risk in the circumstances. Heedlessness

¹⁰⁵ See H. M. Commissioners on Criminal Law, above n. 3 at xlii: ‘it is no excuse to the offender to say that he used the utmost caution in doing an act which he ought not to have done at all.’

¹⁰⁶ R. Evans (Gemma) [2009] EWCA Crim 650, [2010] 1 All ER 13. Cf. R. v Miller (James) [1983] 2 AC 161 (HL).

¹⁰⁷ Above n. 29.

¹⁰⁸ R. v Bristow (Terrence) & Ors [2013] EWCA Crim 1540, [2013] All ER (D) 109 (Sep).

¹⁰⁹ R. v Watson [1989] 2 All ER 865 (CA).

involves doing something which could only have been foreseen and avoided if the dangerous circumstances are readily avoidable. I hope to show how important this distinction is to unlawful *and dangerous* act manslaughter when we address two similar cases in more detail.

The importance of having the mental capacity to foresee and the opportunity to avoid the required harm is illustrated in *JF and NE's Case*,¹¹⁰ in which the Court of Appeal reaffirmed the objective nature of dangerousness with regards to unlawful act manslaughter. The medical evidence suggested that JF, who was fourteen-and-a-half at the time of the incident, had the mental capacity of a six-year-old. He was convicted of the manslaughter of a homeless man, which was caused by a fire that he had started in the basement of a derelict building. The defendants had been acquitted of arson recklessly endangering life and it is not even clear that an adult would have appreciated that the smoke and carbon monoxide from the fire could kill someone in less than five minutes. Heedlessness does not affect the degree of foreseeable harm required, neither does it affect the capacity to foresee, but its significance lies in the opportunity to avoid creating the risk.

The significant issue, with regards to heedlessness, is that those circumstances known to the bystander allow the defendant 'to exercise the capacity to advert to' the foreseeable risk *and* to avoid it.¹¹¹ There may be circumstances in which the foreseeable risk arises during the performance of the unlawful act, but cannot be avoided. The bystander should also be aware of all those circumstances which the defendant is aware of in committing the crime, including those which are known beforehand.

¹¹⁰ Above n. 5.

¹¹¹ See Hart, above n. 72.

The fact that dangerousness does not account for the opportunity to avoid the risk was evident in *Watson*,¹¹² where the Court held that:

the appellant's unlawful act comprised the whole of the burglarious intrusion and he must have become aware of his victims [sic] frailty and approximate age.¹¹³

Although the risk of some harm became foreseeable during the course of the unlawful act, *Watson* could not avoid creating the risk of bodily harm caused by the victim's frailty and age. Horder suggested that this could be prosecuted by means of manslaughter by gross negligence but, even if it were proven that 'D carried on with the burglary despite knowing that a frail householder was aware',¹¹⁴ the risk could not be minimised in this way and should that even be relevant with regards to the commission of a crime?

In *Bristow*¹¹⁵ the Crown placed reliance on the fact that the workshops, from which a vehicle was stolen, were close to the farmhouse in which the deceased lived, and the 'burglary would involve the use of heavy vehicles ... at night [that] would have to manoeuvre in a confined space.'¹¹⁶ The risk of bodily harm was foreseeable *and* avoidable. Treacy, L.J., held that this was:

¹¹² *R. v Watson* [1989] 2 All ER 865 (CA).

¹¹³ *R. v Watson* [1989] Crim LR 733 (CA) at 733.

¹¹⁴ Above n. 13 at 149.

¹¹⁵ *R. v Bristow (Terrence) & Ors* [2013] EWCA Crim 1540, [2013] All ER (D) 109 (Sep).

¹¹⁶ *Ibid.* at [7] (Treacy LJ).

not a case like *Dawson* or *Watson* where the circumstances demonstrating the risk of harm to the occupier of property did not arise until a point during the burglary or at all.¹¹⁷

It should be acknowledged that the unlawful act was a ‘conspiracy to burgle’ and that prospective circumstances therefore had more significance,¹¹⁸ but the idea of potentially focusing on prior opportunity is no less valid.

Heedlessness, like negligence, requires us to look at a wider time-frame than recklessness when determining whether the defendant should have recognised the risk involved. This does not mean, as in *Watson’s Case*,¹¹⁹ that crimes need necessarily be seen as continuing acts, but it does mean that the courts should look to circumstances which would have given the defendant the opportunity to foresee and avoid creating the risk, even if those circumstances precede the commission of the criminal act. Ashworth explained any reliance on circumstances known beforehand:

enquiry into capacity and opportunity necessitated by negligence liability widens the time-frame of the criminal law, giving precedence to the doctrine of prior fault over the principle of contemporaneity.¹²⁰

In terms of prior fault, the defendant who has killed in the course of an unlawful act can only really be said to have ‘made oneself a “time-bomb”’,¹²¹ as Chris Clarkson

¹¹⁷ Ibid. at [34] (Treacy LJ).

¹¹⁸ Ibid. at [10] (Treacy LJ).

¹¹⁹ Above n. 112.

¹²⁰ A. Ashworth, *Principles of Criminal Law*, 5th edn (Oxford University Press: Oxford, 2006) 193.

¹²¹ C. M. V. Clarkson, ‘Context and Culpability in Involuntary Manslaughter’ in A. Ashworth and B. Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press: Oxford, 2000) 158.

suggested,¹²² if there was the capacity to foresee *and* the opportunity to avoid the creation of the risk. The doctrine is important, therefore, in recognising that a failure to recognise an obvious risk need not arise at the same time as the unlawful act that causes death: the opportunity to foresee *and* avoid the dangerous circumstances may appear before the unlawful act has been committed; the heedless risk-taking and the unlawful act need not be seen as contemporaneous.

Anthony Kenny noted that the ‘threat of punishment for negligence is meant to enforce at all times a standard of care’.¹²³ This, of course, can only be done if there is prospective notice of the potential duty and this is where the law is ‘at its retrospective worst’.¹²⁴ In the case of heedlessness the threat of punishment would enforce a standard of foresight in the commission of an advertent crime, so that individuals exert their faculties with regards to dangerous circumstances created by committing that crime.

The need for a distinction between negligence and heedlessness is illustrated by applying both to the facts of *Bristow*.¹²⁵ The duty of care required for gross negligence manslaughter and its breach might have been established: manoeuvring vehicles at night in a confined space could have exposed the householder to a reasonably foreseeable and serious risk of death.¹²⁶ But the idea that unlawful *and dangerous* act manslaughter cases can be dealt with under gross negligence manslaughter has been doubted.¹²⁷ The creation of risk was foreseeable before the unlawful act was committed and there was, therefore, the opportunity to avoid it by avoiding the unlawful act. By carrying on the defendants had been heedless.

¹²² Clarkson was referring to crimes of violence.

¹²³ Above n. 53 at 89.

¹²⁴ See Ashworth, above n. 120 at 293. Cf. A. Ashworth, ‘Manslaughter by omission and the rule of law’ [2015] Crim LR, 8, 563.

¹²⁵ *R. v Bristow (Terrence) & Ors* [2013] EWCA Crim 1540, [2013] All ER (D) 109 (Sep).

¹²⁶ *R. v Adomako* [1995] 1 AC 171 (HL). Cf. *R. v Singh (Gurphal)* [1999] Crim LR 582 (CA).

¹²⁷ See Horder, above n. 13 at 149.

Negligence suggests that the risk has been created *through* taking insufficient care before or during an activity. Heedlessness suggests that the risk has been created *by* the activity. The opportunities to minimise the risk or to avoid creating it are different.

Reconstructing unlawful act manslaughter

The law as it stands is an amalgam of two different kinds of unlawful act manslaughter. Without the justificatory force of an act of intended bodily harm, the correspondence principle tells us that liability for death is appropriate only where death is intended or foreseen,¹²⁸ or at least foreseeable.¹²⁹ Even Ashworth, who argued that an intended act of actual bodily harm that causes death should not be labelled as a homicide offence,¹³⁰ acknowledges that liability for negligently causing death may be justified 'subject to certain conditions (for example an incapacity exception, and suitable rule-of-law protections such as due notice).'¹³¹

In the light of the Court of Appeal's view, that these issues should once again be referred to the Law Commission,¹³² the time has come to recognise the separate justifications involved in manslaughter by an unlawful and dangerous act, as compared with an act of intended bodily harm. In the absence of these hoped-for reforms, the courts have shown themselves to be capable of reaching the appropriate degree of harm in gross negligence manslaughter.¹³³ It may be that the most that can be achieved through legislation is the sought-after capacity exception,

¹²⁸ B. Mitchell, 'In Defence of the Correspondence Principle' [1999] Crim LR 195.

¹²⁹ See Tadros, above n. 69.

¹³⁰ A. Ashworth, 'Manslaughter: Generic or Nominate Offences' in C. M. V. Clarkson and S. Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Ashgate Publishing: Aldershot, 2008) 242.

¹³¹ Above n. 36 at 236.

¹³² Above n. 7. Cf. A. Ashworth, 'Case Comment' [2013] Crim LR, 4, 335 at 337.

¹³³ *R. v Adomako* [1995] 1 AC 171 (HL).

which has been compared to the impact that section 8 of the Criminal Justice Act 1967 had on the presumption of intended consequences.¹³⁴ There is certainly inconsistency between the objective tests in gross negligence manslaughter and unlawful *and dangerous* act manslaughter. In the recent case of *R. v. S*,¹³⁵ the Court of Appeal held that the objective test, in gross negligence manslaughter, denoted ‘a reasonable and prudent person of the applicant’s *age and experience*’.¹³⁶ Why should the Court of Appeal make this exception and at the same time refuse to acknowledge the capacity of the defendants in *JF and NE*?¹³⁷

It is, however, arguable that even in the context of such an exception, advertent risk-taking is more culpable than heedlessness. But can it really be said that: ‘actions which, for all one knows, may be dangerous are less dangerous than actions which one positively knows to be a risk’?¹³⁸ Actions which, for all one knows, may create risks are arguably *more* prevalent, if *less* culpable, because they are more difficult to avoid than advertent creation of risk. The advertent risk-taker has not avoided taking the risk, but surely inadvertent risk-taking is no less prevalent.¹³⁹

There is historical authority for unlawful and dangerous act manslaughter and manslaughter by an act of intended bodily harm. The moral authority for the latter may reside in the law’s respect for physical integrity or an attitude towards luck. But it must not be forgotten that they were and could be separate means of proving manslaughter with separate justifications. Unlawful act manslaughter might be

¹³⁴ B. Mitchell, ‘Minding the Gap in Unlawful and Dangerous Act Manslaughter: A Moral Defence of One-punch Killers’ (2008) 72 J Crim L 537 at 538.

¹³⁵ *R. v S* [2015] EWCA Crim 558, [2015] All ER (D) 341 (Mar).

¹³⁶ *R. v S* [2015] EWCA Crim 558, [2015] All ER (D) 341 (Mar) [20] (Cranston J). Italics added.

¹³⁷ *R. v JF and another* [2015] EWCA Crim 351, [2015] All ER (D) 117 (Mar). Cf. *R. v Creighton* [1993] 3 SCR 3, 1993 CanLII 61 (SCC) <http://canlii.ca/t/1fs09> accessed 3 June 2016.

¹³⁸ See Kenny, above n. 53 at 89. Cf. R. A. Duff, ‘*Caldwell* and *Lawrence*: The Retreat from Subjectivism’ (1983) 3(1) OJLS 77.

¹³⁹ The construction of a “ladder” of homicide offences is outside the scope of this article.

justified, at least in part, by the opportunity to avoid the creation of the foreseeable risk.

This would involve a different approach from the most recent recommendation of the Law Commission.¹⁴⁰ There are grounds for unlawful act manslaughter where the *likely* risk of *death*, from the commission of an unlawful act in the circumstances, can be foreseen *and* avoided by an individual of the same age as the defendant, provided that s/he is mentally/physically able and that s/he is put on notice of the required standard of foresight, through the commission of an advertent crime. If it is felt necessary to limit the scope of unlawful act manslaughter to crimes of violence, actual bodily harm is an appropriate degree of harm provided that it is *intended*.

Fifty years ago, in his 'classic' article,¹⁴¹ Buxton argued that 'there is perhaps something to be said for making the degree of hazard required rather less severe when it is intentionally as opposed to negligently caused.'¹⁴² That 'something' is arguably pursuit, which is an attitude of dependency on luck, displayed by an act of intended bodily harm.

¹⁴⁰ Above n. 8.

¹⁴¹ See Ashworth, above n. 1.

¹⁴² Richard Buxton, 'By Any Unlawful Act' (1966) 82 LQR 174, 194.